



[Billing Code 7709-02-P]

**PENSION BENEFIT GUARANTY CORPORATION**

**Pendency of Request for Exemption From the Bond/Escrow Requirement Relating to the Sale of Assets by an Employer Who Contributes to a Multiemployer Plan; Harrington Air Systems, LLC and J.C. Cannistraro, LLC**

**AGENCY:** Pension Benefit Guaranty Corporation

**ACTION:** Notice of pendency of request

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**SUMMARY:** This notice advises interested persons that the Pension Benefit Guaranty Corporation (“PBGC”) has received a request from Harrington Air Systems, LLC, and its sister company J.C. Cannistraro, LLC, for an exemption from the bond/escrow requirement of section 4204(a)(1) of the Employee Retirement Income Security Act of 1974, as amended, with respect to the Sheet Metal Workers National Pension Fund. Section 4204(a)(1) provides that the sale of assets by an employer that contributes to a multiemployer pension plan will not constitute a complete or partial withdrawal from the plan if certain conditions are met. One of these conditions is that the purchaser posts a bond or deposits money in escrow for the five-plan-year period beginning after the sale. PBGC is authorized to grant individual and class exemptions from this requirement. Before granting an exemption PBGC is required to give interested persons an opportunity to comment on the exemption request. The purpose of this notice is to advise interested persons of the exemption request and solicit their views on it.

**DATES:** Comments must be received on or before [INSERT 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Comments may be submitted by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the Web site instructions for submitting comments.
- E-mail: [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov).
- Fax: 202-326-4224.
- Mail or Hand Delivery: Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026.

Comments received, including personal information provided, will be posted to [www.pbgc.gov](http://www.pbgc.gov).

Copies of comments and non-confidential portions of the request may be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW, Washington, DC 20005-4026 or calling 202-326-4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4040.)

**FOR FURTHER INFORMATION CONTACT:** Bruce Perlin ([Perlin.Bruce@PBGC.gov](mailto:Perlin.Bruce@PBGC.gov)), 202-326-4020, ext. 6818 or Jon Chatalian ([Chatalian.Jon@PBGC.gov](mailto:Chatalian.Jon@PBGC.gov)), ext. 6757, Office of the Chief Counsel, Suite 340, 1200 K Street N.W., Washington, DC 20005-4026; (TTY/TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4020.)

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Section 4204 of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (“ERISA” or “the Act”), provides that a bona fide arm’s-length sale of assets of a contributing employer to an unrelated party will

not be considered a withdrawal if three conditions are met. These conditions, enumerated in section 4204(a)(1)(A)–(C), are that—

(A) The purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contributions base units for which the seller was obligated to contribute;

(B) The purchaser obtains a bond or places an amount in escrow, for a period of five plan years after the sale, equal to the greater of the seller’s average required annual contribution to the plan for the three plan years preceding the year in which the sale occurred or the seller’s required annual contribution for the plan year preceding the year in which the sale occurred; and

(C) The contract of sale provides that if the purchaser withdraws from the plan within the first five plan years beginning after the sale and fails to pay any of its liability to the plan, the seller shall be secondarily liable for the liability it (the seller) would have had but for section 4204.

The bond or escrow described above would be paid to the plan if the purchaser withdraws from the plan or fails to make any required contributions to the plan within the first five plan years beginning after the sale.

Additionally, section 4204(b)(1) provides that if a sale of assets is covered by section 4204, the purchaser assumes by operation of law the contribution record of the seller for the plan year in which the sale occurred and the preceding four plan years.

Section 4204(c) of ERISA authorizes PBGC to grant individual or class variances or exemptions from the purchaser’s bond/escrow requirement of section 4204(a)(1)(B) when warranted. The legislative history of section 4204 indicates a Congressional intent that the sales rules be administered in a manner that assures protection of the plan with the least practicable

intrusion into normal business transactions. Senate Committee on Labor and Human Resources, 96th Cong., 2nd Sess., S.1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Considerations 16 (Comm. Print, April 1980); 128 Cong. Rec. S10117 (July 29, 1980). The granting of an exemption or variance from the bond/escrow requirement does not constitute a finding by PBGC that a particular transaction satisfies the other requirements of section 4204(a)(1).

Under the PBGC's regulation on variances for sales of assets (29 CFR part 4204), a request for a variance or waiver of the bond/escrow requirement under any of the tests established in the regulation (§§ 4204.12–4204.13) is to be made by the parties to the sale to the plan in question. PBGC will consider a waiver request by a purchaser or seller only if the transaction does not satisfy the regulatory tests or the parties decline to provide the plan financial information necessary to show satisfaction of one of the regulatory tests because it is privileged or confidential financial information within the meaning of 5 U.S.C. § 552(b)(4) (the Freedom of Information Act).

Under § 4204.22 of the regulation, the PBGC shall approve a request for a variance or exemption if it determines that approval of the request is warranted, in that it—

- (1) Would more effectively or equitably carry out the purposes of Title IV of the Act; and
- (2) Would not significantly increase the risk of financial loss to the plan.

Section 4204(c) of ERISA and § 4204.22(b) of the regulation require PBGC to publish a notice of the pendency of a request for a variance or exemption in the *Federal Register*, and to provide interested parties with an opportunity to comment on the proposed variance or exemption.

### **The Request**

The PBGC has received a request from Harrington Air Systems, LLC (“HAS”) and its sister company J.C. Cannistraro, LLC (“JCC”) (collectively, “Cannistraro” or the “Buyer”) for an exemption from the bond/escrow requirement of § 4204(a)(1)(B) with respect to the Sheet Metal Workers National Pension Fund (the “Fund”) in connection with the purchase of most of the assets of Harrington Brothers Corporation (“HBC” or the “Seller”) on February 28, 2014. HAS is an entity set up by JCC in order to effectuate the purchase of HBC’s assets. In the request, the Buyer represents that HAS and JCC are businesses under common control pursuant to 26 C.F.R. § 1.414(c)-2 and therefore treated as one employer under ERISA. Additionally, the Buyer represents, among other things, that:

1. Under the terms of the asset purchase agreement, the Buyer paid the Seller approximately \$5.1 million in the form of an unsecured promissory note that may be adjusted post-closing based on the performance of certain construction contracts in place at the time of the transaction.
2. The Buyer is obligated to contribute to the Fund for the purchased operations for substantially the same contribution base units for which the Seller had an obligation to contribute.
3. The Seller has agreed to be secondarily liable for any withdrawal liability it would have had with regard to the sold operations (if not for § 4204) should the Buyer withdraw from the Fund within the five plan years following the sale and fail to pay withdrawal liability.

4. The estimated amount of unfunded vested benefits allocable to the seller with respect to the operations sold is about \$23.5 million.
5. The amount of the bond/escrow required under § 4204(a)(1)(B) is \$1.68 million.
6. After the close of the transaction, the Buyer requested that the trustees of the Fund waive the bond/escrow requirements of ERISA § 4204. By its counsel, the Fund denied the request on the grounds that the Buyer had not satisfied the income or asset tests under PBGC's regulations for an exemption from the bond/escrow requirement of § 4204(a)(1)(B).
7. The Fund determined that to receive a waiver of the bond/escrow requirement under the net income test of 29 C.F.R. 4204.13(a)(1), the average net income needed for the three-year period prior to the transaction should have been \$400,000 greater than the amount reported.
8. The Buyer asserts that the three-year average net income of JCC was lowered due to an "aberrantly poor year" in the construction industry in Massachusetts in 2011. The Buyer states that JCC's average net income for the years between 2011-2014 was approximately \$1 million more than what was required to meet the net income test under 29 C.F.R. 4204.13(a)(1), and that its net income for the 3 years between 2012-2014 was approximately \$1.5 million more than what was required.
9. The Buyer further asserts that, in denying the Buyer's request for a waiver, the Fund looked only at the average net income of JCC. It contends that aggregating the net incomes of JCC and HAS, two businesses under common control under 26 C.F.R. 1.414(c)-2, shows that there "can be no serious argument that a waiver will create risk

for the Fund, let alone substantial risk.” HAS’s anticipated net income for 2014 is approximately \$300,000.

10. The Buyer’s request additionally states that a variance of the bond/escrow requirement in this instance furthers the purposes of Title IV of ERISA because Congress, in enacting Title IV, sought to minimize intrusions into normal business operations while protecting plans. The Buyer asserts that HBC had previously been a “struggling enterprise” and that the transaction has “resulted in a more stable and financially secure contributing employer to the Fund.”

### **Comments**

All interested persons are invited to submit written comments on the pending exemption request. All comments will be made part of the administrative record.

Issued in Washington, DC, on this \_16\_\_ day of June,  
2015.

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**Alice C. Maroni,**  
Acting Director,  
Pension Benefit Guaranty Corporation.  
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